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## PRELIMINARY STATEMENT

Plaintiffs Daniel Golden and Tracey Locke's claim seeks relief for an alleged denial of access to records under the New Jersey Open Public Records Act ("OPRA"). Defendants, New Jersey Institute of Technology ("NJIT"), and NJIT's Custodian of Records, Clara Williams ("Williams")(collectively, "Defendants" and/or "NJIT"), submit that plaintiffs' claim is misplaced and improperly directed against defendants who have duly and timely complied with their obligations under OPRA, rather than the Federal Bureau of Investigation ("FBI"), which is the entity that redacted certain documents and directed NJIT to withhold from production certain other documents.

In responding to three separate, yet essentially identical, OPRA requests submitted by plaintiffs seeking access to email communications between certain NJIT officers and members of the FBI and Central Intelligence Agency ("CIA")<sup>1</sup>, defendants produced certain records, some with and some without redactions, and provided references to several valid exemptions applicable to other records which were withheld from disclosure at the direction of the FBI. Such exemptions included, inter alia, directives from the FBI expressly prohibiting dissemination based on the FBI's position that such records constituted property of the United States of America, the confidential and privileged nature of which prohibited disclosure by NJIT.

A review of the steps completed by NJIT in responding to plaintiffs' three OPRA requests establish beyond any doubt that NJIT complied with the requisite legal mandates by amassing responsive records, involving the appropriate authorities who maintained ownership

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<sup>1</sup> NJIT's search for responsive records ultimately returned no records pertaining to the CIA and, as such, this claim pertains to the propriety of denial of public access to the records redacted by the FBI and those documents directed by the FBI to be withheld from production.

interests in the records amassed despite NJIT's physical possession of same, and properly and timely responded to plaintiffs' requests in writing within the strict time parameters afforded by OPRA. The unique nature of plaintiffs' requests in this case which required the involvement of the FBI left NJIT faced with a Hobson's choice. On the one hand, NJIT has a duty under OPRA to produce any and all responsive records not otherwise subject to potentially applicable exemptions. On the other hand, however, NJIT not only lacked authority, but was expressly prohibited by another federal agency in writing from disclosing such records which had the potential to implicate serious criminal and/or national security interests. Plaintiffs' claim in this case misses the mark in that NJIT did not unilaterally and without reason delimit its production. Rather, any denial of access in terms of the redactions and withheld documents was not unlawful but, rather, made exclusively pursuant to the express direction of the FBI.

Given the FBI's unique involvement in the review, redaction and production process, defendants most certainly acted reasonably and in good faith under the special circumstances in this case. Thus, Plaintiffs' claim against defendants NJIT and Williams must be dismissed and, instead, redirected against the real party in interest, the FBI.

#### PROCEDURAL HISTORY/STATEMENT OF FACTS

Plaintiffs' verified complaint and order to show cause, filed on September 11, 2015, seeks to have defendants NJIT and Williams provide access to public records purportedly supporting the writing of a book by plaintiff Golden about the relationship between federal intelligence agencies, including the FBI and CIA, and colleges and universities. See Verified Complaint at ¶¶ 1-3. Plaintiffs' verified complaint is brought pursuant to OPRA, N.J.S.A. 47:1A-1, et seq., and the common law right of access. See Verified Complaint at ¶ 1. More specifically, plaintiffs allege that between April and August of 2015, they made three requests to NJIT under

both OPRA and common law right of access to email correspondence between NJIT employees and the FBI and/or CIA and that defendants have improperly and unlawfully withheld, in whole or in part, all or a vast majority of the records requested. See Verified Complaint at ¶¶ 4-5.

Plaintiffs further claim that they seek this information to inform the public as to the nature and extent of the relationship between NJIT and federal law enforcement and intelligence agencies.

Id. at ¶ 6.

All three of plaintiffs' OPRA requests which form the basis for the complaint in this matter were directed to Williams, who serves as the Office Administrator for the Office of General Counsel and OPRA Custodian of Records for NJIT since 2002. See ¶1 of the Certification of Clara Williams, dated November 11, 2015, submitted contemporaneously herewith ("Williams' Cert."). In responding to all three of plaintiffs' OPRA requests, Williams strictly complied with the policy, procedure and protocol set forth by the Government Records Counsel ("GRC"), as outlined in The New Jersey Open Public Records Act Handbook for Records Custodians and Custodian's Toolkit. See Williams' Cert. at ¶2.

A. The First Request

Plaintiff Golden, a managing editor for Bloomberg News, submitted the first of the three subject OPRA requests (the "First Request") directly to Williams by email on April 8, 2015 at 5:12 p.m. See Williams' Cert. at ¶17. The First Request sought the following records:

"[A]ll e-mail communications since January 1, 2010, between the Central Intelligence Agency or its representatives using the email domains @ucia.gov, @cia.gov, or any other address, and the following people at the New Jersey Institute of Technology: the president, chancellor(s), provost(s), vice provost(s), vice presidents, deans, general counsel, assistant general counsel, outside counsel, and campus police chief. Similarly, I am requesting all e-mail communications since January 1, 2010, between the Federal Bureau of Investigation or its representatives using the email domains @ic.fbi.gov, @fbi.gov, or any other email address, and the same people at NJIT."

See Williams' Cert. at ¶18.

In furtherance of her duties as the OPRA Custodian of Records, on receipt, Williams forwarded the First Request by email to David Ullman, Associate Provost for Information Services & Technology and Chief Information Officer for NJIT, as Mr. Ullman is the individual with the authority to authorize access to the emails sought in the First Request. See Williams' Cert. at ¶19. Williams simultaneously contacted Annie Crawford, Assistant Vice President of the Department of Human Resources for NJIT, and requested the identities of all individuals who held the official titles of Police Chief, Provost, Vice Provost, Vice President, and Dean, during the period January 1, 2010 – April 9, 2015, whose emails were sought as part of the First Request. See Williams' Cert. at ¶20. Upon receipt of the list of individuals holding such titles provided by Ms. Crawford, Williams immediately forwarded same to Mr. Ullman to facilitate his search for responsive records. See Williams' Cert. at ¶21. All this transpired in less than two hours from the time Williams first received and reviewed the First Request. See Williams' Cert. at ¶17-21.

In turn, Ullman solicited the assistance of Devin Batra, Database Administrator for the Information Services and Technology Department at NJIT, to search for and retrieve responsive emails. See Williams' Cert. at ¶22. Batra accessed NJIT's mainframe and performed a search of the email extensions set forth in the First Request [@ucia.gov, @cia.gov, @ic.fbi.gov, @fbi.gov] and the list of individuals provided by Ms. Crawford. See Williams' Cert. at ¶23. Mr. Batra compiled all emails that were returned on his search and placed them on a DVD, which Batra then delivered and downloaded to Williams' computer on April 13, 2015, just four (4) days after the First Request was received by Williams. See Williams' Cert. at ¶24.

On receipt of the emails, Williams began reviewing and printing them. See Williams' Cert. at ¶25. In light of the massive volume of emails, on April 14, 2015, Williams emailed plaintiff Golden and requested an extension until May 29, 2015, to respond to the First Request. By email on that same date, April 14, 2015, plaintiff Golden agreed to Williams' extension request. See Williams' Cert. at ¶26.

During the course of Williams' review of the printed emails, she came across several notices that contained FBI warnings and prohibitions to the effect that the emails were not to be disclosed to anyone, including statements such as "do not disclose"; "proprietary and confidential information"; and several emails containing information pertaining to terrorism and national security issues. See Williams' Cert. at ¶27. Having concerns about the FBI warnings/prohibitions, Williams sought guidance as to whether NJIT should notify the FBI of the First Request and the emails generated by NJIT's search for responsive records. See Williams' Cert. at ¶28. Williams then contacted NJIT's FBI contact, Special Agent McHugh, and informed her of the First Request, the massive number of emails generated by the search for responsive records, the nature of the emails and the FBI written prohibition against dissemination included therein. See Williams' Cert. at ¶28. Agent McHugh advised Williams that the FBI would need to review all of the emails before any disclosure occurred. See Williams' Cert. at ¶28

In May 2015, several agents of the FBI made two visits to NJIT to review all of the emails compiled in response to the First Request. See Williams' Cert. at ¶30. On each occasion, Williams brought all of the emails in their original form to a conference room where the FBI review was conducted. See Williams' Cert. at ¶30. Following the FBI agents' review, Williams retrieved the boxes of printed emails from the conference room. See Williams' Cert. at ¶30. No

one from NJIT was continuously present during the FBI review on either occasion. See Williams' Cert. at ¶30.

At the time of their review, the FBI agents advised Williams, in the presence of NJIT Deputy General Counsel Brian Tierney, that any emails directed to and received from the FBI are deemed FBI records and, as such, are the property of the United States Government. See Williams' Cert. at ¶31. As a result, the agents further advised that the FBI is cloaked with full and exclusive authority to determine whether or not any such email is subject to disclosure. See Williams' Cert. at ¶31. During their review, the FBI agents manually redacted many of the records with black marker. See Williams' Cert. at ¶32. The FBI agents also identified other records as entirely "classified" and exempt from disclosure in their entirety. See Williams' Cert. at ¶32. In doing so, the FBI agents directed Williams as to which records she was authorized to disclose (with and without redactions), and which records she was not permitted to disclose. See Williams' Cert. at ¶33. Neither Williams, nor anyone else at NJIT, redacted any of the records compiled in response to the First Request. See Williams' Cert. at ¶34. Rather, all redactions and determinations as to which documents were and were not subject to disclosure were made and dictated solely by the FBI. See Williams' Cert. at ¶34.

At the conclusion of their review, the FBI agents provided NJIT with a letter memorializing the FBI's directive that NJIT not disclose records which were classified as confidential information. See Williams' Cert. at ¶35. The letter states, in pertinent part:

"To the extent that the requestor seeks [United States Government] e-mail communications, and more particularly those of Federal Bureau of Investigation (FBI) personnel, those communications, and attachments, if any, are not to be released. Those communications are the property of the USG and are not to be further distributed without the FBI's prior written approval, in conformance with federal laws and/or regulations including the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the Privacy Act of 1974, 5 U.S.C. § 552a, and, 28 U.S.C. § 534. Among other things, FOIA and the Privacy Act exempt from disclosure

information that is law enforcement sensitive and may implicate criminal and/or national security interests as well as information that is confidential, privileged and/or not authorized for public dissemination/distribution.”

See Williams’ Cert. at Exhibit I.

Williams then prepared a letter response to the First Request, dated May 29, 2015, in which the responsive records compiled during NJIT’s search were divided into three categories:

- (1) Records that were responsive and required no redactions;
- (2) Records that were responsive and required redactions – all redactions having been made by the FBI; and
- (3) Records that were responsive but exempt from disclosure – all decisions and direction to withhold having been made by the FBI.

Williams’ May 29, 2015, letter response to the First Request identified 533 records that were being produced by NJIT, with and without redactions, and 3,949 pages of records that were being withheld from production. See Williams’ Cert. at Exhibit K. Williams’ letter further specifically cited the OPRA exemptions applicable to such redacted and/or withheld records, and referenced and enclosed a copy of the FBI’s letter of May 27, 2015. See Williams’ Cert. at Exhibit K. Williams’ letter further advised plaintiff Golden that the final production cost for the records was \$26.65, payment for which, to date, has not been remitted by plaintiffs. See Williams’ Cert. at Exhibit K.

On May 29, 2015, Williams forwarded the letter response, together with copies of the 533 records and the FBI’s letter of May 27, 2015, to plaintiff Golden by UPS overnight delivery. See Williams’ Cert. at ¶38. By email dated June 5, 2015, plaintiff Golden acknowledged receipt of NJIT’s response to the First Request. See Williams’ Cert. at ¶39. NJIT’s response to the First Request was timely pursuant to the extension of time previously afforded by plaintiff Golden. See Williams’ Cert. at ¶26. However, it should be noted at least as pertaining to plaintiffs’ First

Request, the filing of this lawsuit is not in conformance with the forty-five (45) day statute of limitations. Mason v. City of Hoboken, 196 N.J. 51 (2008).

B. The Second Request

The second OPRA request was submitted to Williams by email on July 28, 2015 at 1:26 p.m. by plaintiff Locke, who identified herself as a publicist with Henry Holt & Company (the “Second Request”). See Williams’ Cert. at ¶41. The Second Request sought the following records:

“[A]ll email communications since January 1, 2010, between the Central Intelligence Agency or its representatives using the email domains @ucia.gov, @cia.gov, or any other address, and the following people at the New Jersey Institute of Technology: the president, chancellor(s), provost(s), vice provost(s), vice presidents, deans, general counsel, assistant general counsel, outside counsel, and campus police chief. I also request all email communications since January 1, 2010, between the Federal Bureau of Investigation or its representatives using the email domains @ic.fbi.gov, @fbi.gov, or any other email address, and the same people at NJIT.”

See Williams’ Cert. at ¶42.

Recognizing the Second Request sounded familiar, Williams referred back to the First Request and realized the two requests were identical. See Williams’ Cert. at ¶43. In light of the position taken by the FBI in response to the First Request, together with the prohibition on disclosure set forth in the FBI’s letter of May 27, 2015, Williams immediately contacted Special Agent McHugh by telephone and email to discuss the Second Request and the manner in which NJIT should respond to same. See Williams’ Cert. at ¶44-45.

On July 29, 2015, just one day after the Second Request was received, Williams sent a letter response to plaintiff Locke by email denying the Second Request, citing to several applicable OPRA exemptions and the FBI’s letter of May 27, 2015, prohibiting disclosure of the records requested. See Williams’ Cert. at ¶46.

### C. The Third Request

On August 13, 2015 at 4:10 p.m., plaintiff Golden submitted the third OPRA request to Williams by email (the “Third Request”). See Williams’ Cert. at ¶47. The Third Request mirrored the First Request and sought the following records:

“[A]ll email communications from January 1, 2010, to the date of this request, between the Central Intelligence Agency or its representatives using the email domains @ucia.gov, @cia.gov, or any other address, and the following people at the New Jersey Institute of Technology: the president, chancellor(s), provost(s), vice provost(s), vice presidents, deans, general counsel, assistant general counsel, outside counsel, and campus police chief. Similarly, I am seeking all e-mail communications from January 1, 2010, to the date of this request between the Federal Bureau of Investigation or its representatives using the email domains @ic.fbi.gov, @fbi.gov, or any other email address, and the same people at NJIT.”

See Williams’ Cert. at ¶48.

Given the similarities between the First and Third Requests, Williams immediately emailed plaintiff Golden to ascertain whether the Third Request had been sent in error since it was clearly duplicative of the First Request, which NJIT previously responded to on May 29, 2015. See Williams’ Cert. at ¶49. Plaintiff Golden responded by advising the Third Request was broader than the First Request in that the Third Request sought records through the then-current date of August 13, 2015. See Williams’ Cert. at ¶50.

Williams orally advised Special Agent McHugh of the Third Request and the manner in which NJIT would respond given the position previously asserted by the FBI with respect to the two prior identical requests. See Williams’ Cert. at ¶51-52

On August 17, 2015, within the time parameters afforded by OPRA, Williams sent a letter response to plaintiff Golden by email denying the Third Request, citing to several applicable OPRA exemptions and the FBI’s letter of May 27, 2015, prohibiting disclosure of the records requested. See Williams’ Cert. at ¶53.

Plaintiffs instituted this lawsuit on September 11, 2015, by way of Verified Complaint and Order to Show Cause alleging denial of access. Specifically, plaintiffs allege defendants (1) failed to provide access to the vast majority of the records responsive to the First Request; (2) failed to provide access to any records responsive to the Second Request; (3) failed to specify with particularity the reasons for withholding any government records or any portion of those records responsive to the First, Second or Third Request; and (4) failed to disclose all nonexempt portions of government records responsive to the First, Second or Third Request. See plaintiffs' Verified Complaint at ¶34. Defendants submit that plaintiffs' claim is misplaced because defendants strictly complied with their duties under New Jersey law and that any challenge by plaintiffs regarding the denial of access to the records requested is appropriately directed to the FBI. Accordingly, defendants have implead the FBI as a third-party defendant by way of the Answer and Third-Party Complaint filed contemporaneously herewith.

## LEGAL ARGUMENT

### POINT I

#### NJIT PROPERLY WITHHELD THE FEDERAL BUREAU OF INVESTIGATION'S CONFIDENTIAL AND PROPRIETARY INFORMATION

In moving for the requested relief, plaintiffs claim that defendants unlawfully withheld, in whole or in part, the vast majority of the records requested in violation of OPRA. Indeed, plaintiffs' claim is misdirected because the records requested are the property of the United States Government, namely the FBI, and, thus, not for NJIT to disseminate without the FBI's prior written approval. See Exhibit I to Williams' Cert. The FBI did not provide NJIT with written approval to disclose the records in this case and explicitly prohibited NJIT from doing so

and memorialized its prohibition in writing. Id. As such, any challenge by plaintiffs in terms of denial of access are appropriately directed to the FBI.

Upon receipt of each of the three OPRA requests at issue herein, Williams, in consultation with internal legal counsel, contacted the FBI to discuss the requests and the potentially responsive records. See Williams' Cert. at ¶28, 45, 51. The emails that defendants uncovered were turned over to FBI personnel, who, in turn, reviewed the records, made redactions, and directed which records were exempted from production and therefore not to be produced. In doing so, the FBI instructed NJIT to withhold the information the FBI deemed confidential, privileged and not authorized for public dissemination/distribution. In particular, the FBI advised the subject records were protected from disclosure under the federal Freedom of Information Act ("FOIA") and the Privacy Act of 1974, because the information is law enforcement sensitive and may implicate criminal and/or national security interests. See Exhibit I to Williams' Cert. Relying on the FBI's directive, NJIT produced certain records the FBI deemed subject to disclosure (some with and some without redactions), and withheld other responsive records the FBI deemed confidential, privileged and otherwise exempt from public dissemination.

FOIA exempts from disclosure "records of information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C.A. §552(b)(7)(A). The exemption prevents the premature disclosure of materials and information that could be used as part of a federal law enforcement investigation. FBI v. Abramson, 456 U.S. 615, 621 (1982). This exemption requires a showing that "(1) a law

enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm.” Id.

In Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), the Appellate Division held the federal law enforcement exemption under 5 U.S.C.A. §552(b)(7)(A) applicable to a request for government records under OPRA and upheld the defendants withholding of those records previously subpoenaed by a federal grand jury. The Appellate Division recognized that a request for government records that are also a part of a federal investigation places the State agency in the difficult position of asserting a privilege on behalf of another governmental agency. Id. at 215. While the burden rests with the State agency to prove that the denial of access to a government record is authorized by law, the confidentiality interest lies with the federal law enforcement agency, in this case the FBI. Id.

The FBI is the leading criminal investigative body in the United States that acts to protect the interests of the United States and its citizens. Far be it from the defendants to independently assess the nature of the emails produced and to circumvent FBI input if confidential information is at stake that could compromise investigations and implicate national security interests. In this regard, the appropriate body that plaintiffs should pursue is the FBI and/or the United States. See United States v. Story County, Iowa, 28 F.Supp.3d 861, 873 (S.D.Iowa 2014) (“To the extent Politico and others seek disclosure of such federal records, Story County must defer the disclosure request to FirstNet for its consideration under federal law”); accord Gannett, 379 N.J. Super. at 215 (“the public agency shall have the burden of proving that the denial of access to a document is authorized by law. However, the custodian may not be in a position to discharge this burden if the asserted confidentiality interest in a document is not that of the government agency

upon which the document request was made but rather another government agency, in this instance the United States Attorney's Office").

The purpose of OPRA is "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 64-65 (2008)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). Although expansive, OPRA is not without limits. O'Boyle v. Borough of Longport, 218 N.J. 168, 184 (2014)("Despite the expansive definition of government record, not all documents prepared by public employees are considered government records pursuant to OPRA."). Under OPRA, "agencies are required to disclose only 'identifiable' governmental records not otherwise exempt." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005); N.J.S.A. 47:1A-5(a). Most relevant to this case, OPRA exempts from disclosure those records that are exempt from disclosure under federal law. N.J.S.A. 47:1A-5(a)("The custodian of a government record shall permit the record to be inspected, examined, and copied ... unless a government record is exempt from public access by ... any federal law; federal regulation; or federal order"). Further, OPRA explicitly does not "abrogate any exemption of a public record or government record from public access heretofore made pursuant to ... any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order." N.J.S.A. 47:1A-9(a). Interestingly, plaintiffs acknowledge these precise legal precepts, as well as the Appellate Division's holding in Gannett New Jersey Partners v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), that "records held by a State records custodian were exempt from disclosure under OPRA because the records were

exempt under FOIA[.]” See plaintiffs’ memorandum of law in support of their order to show cause at 13-15. Yet, plaintiffs argue that public records cannot be exempted in the face of an OPRA request even if they are exempt under FOIA. Id. at 15. These diametrically opposed views surely demonstrate plaintiffs’ misplaced argument in the present matter, or at least confirm plaintiffs should be litigating the propriety of the redactions and documents withheld from production against the FBI, and not Defendants.

Defendants, at all times, followed FBI directives vis-à-vie plaintiffs’ OPRA requests based upon the FBI’s position that the emails were government property over which the FBI retained sole and exclusive jurisdiction. Per the FBI’s directive that the withheld records are confidential and privileged government records exempt from disclosure under FOIA, the records are, at least in the first instance, exempt from disclosure under OPRA by Defendants. See United States v. Story County, Iowa, 28 F.Supp.3d 861 (S.D.Iowa 2014) (emails sent and received by federal employee were federal records and thus not subject to Iowa Open Public Records Act). To the extent plaintiffs seek to challenge the propriety of the confidential designations, such challenges must be directed to the FBI.

## POINT II

### NJIT’S RESPONSES TO ALL THREE OF PLAINTIFFS’ OPRA REQUESTS ARE LAWFUL AND COMPLIANT

Plaintiffs further claim the exemptions that defendants rely upon are inapplicable to the requested records, and that defendants have failed to provide a specific basis for withholding any particular document or portion thereof. See plaintiffs’ memorandum of law in support of their order to show cause at 5. This assertion is belied by the record. Defendants have provided very

specific reasons for limiting and/or denying access which go well beyond “conclusory and generalized allegations of exemptions.”

Regarding the redacted documents produced, defendants have indicated that “redactions were made to ... delete personal identifiable information of FBI personnel and/or FBI information provided to NJIT.” See plaintiffs’ Verified Complaint at Exhibit B. The same is true for the 3,696 pages of documents that were exempted from production. Here again, defendants have specifically identified FBI emails with language that limits publication, reproduction, distribution, and/or dissemination. Further, each of NJIT’s letter responses not only identifies and provides the citation, but quotes the specific language contained in the exemptions applicable to both the records that were redacted and those that were withheld from production, as follows:

N.J.S.A. 47:1A-1.1(11): Security measures and surveillance techniques which, if disclosed, would create a risk to the safety or persons, property, electronic data or software.

N.J.S.A. 47:1A-9(a): The provisions of this act shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to ... any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

Executive Order No. 21 (McGreevey 2002): Records where inspection, examination or copying would substantially interfere with the State’s ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism.

Executive Order No. 26 (McGreevey 2002): Records in the possession of another department when those records are made confidential by a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1, et seq. and Executive Order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.

And, NJIT made specific reference to and provided to the plaintiffs a copy of the FBI's letter of May 27, 2015, expressly prohibiting NJIT's release of the records at issue.

The law addressing NJIT's obligations to comply with OPRA requests is clear. To that end, a "government custodian ... must locate and redact the requested documents, isolate exempt documents, identify requests that require extraordinary expenditure of time and effort and warrant assessment of a service charge, and, when unable to comply with a request, indicate the specific basis." Spectraserv, Inc. v. Middlesex County Utilities Auth., 416 N.J. Super. 565, 576 (App. Div. 2010); N.J.S.A. 47:1A-5. NJIT most certainly duly complied with these legal mandates by amassing responsive records, involving the appropriate authorities who maintained ownership interests in such records despite NJIT's physical possession of same, and properly responding to plaintiffs' requests in writing within the strict time parameters afforded by OPRA. Plaintiffs' simple dissatisfaction with the information ultimately provided is not a justifiable basis to get more information than they are otherwise entitled to receive under the law. Thus, plaintiffs' assertions of non-compliance notwithstanding, the defendants have satisfied their legal obligations under OPRA herein.

The foregoing unquestionably demonstrates that defendants have complied with OPRA mandates both procedurally and substantively and therefore plaintiffs' order to show cause should be denied and their verified complaint as against NJIT and Williams dismissed with prejudice.

### POINT III

#### DEFENDANTS MUST NOT BE HELD LIABLE FOR PLAINTIFFS' ATTORNEYS' FEES AND/OR COSTS

Plaintiffs seek attorneys' fees in connection with their order to show cause based on the assumption that they will prevail in this action. Although N.J.S.A. 47:1A-6 indicates that a requestor who prevails shall be entitled to fees, that requestor must still meet his or her burden of proof to obtain fees. "[R]equestors are entitled to attorneys' fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate: (1) a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; and (2) that the relief ultimately secured by plaintiffs had a basis in law." Mason v. City of Hoboken, 196 N.J. 51, 76 (2008). Thus, plaintiffs have two hurdles to overcome in order to obtain attorneys' fees here – first prevail on their order to show cause and then satisfy the two-pronged proof burden to obtain fees. Even assuming arguendo that plaintiffs do prevail in this action, they cannot demonstrate a factual causal nexus or a basis in law for the relief obtained. Minimally, the causal nexus cannot be established here vis-à-vis NJIT given that the FBI intervened in this process and ultimately solely determined and directed the scope and breadth of the documents produced.

### POINT IV

#### THE FBI IS AN INDISPENSABLE PARTY

In this case, the FBI claimed a property interest in the subject emails at issue. Therefore, failing to add the FBI as a party to this action would impede its ability to protect its interest in the emails and subject NJIT to substantial risk of "incurring double, multiple, or other inconsistent obligations" by virtue of the FBI's claimed interest. Put directly, NJIT may potentially be forced

by court order to turn over records which the FBI has essentially ordered not to be disseminated and then be further obligated to pay plaintiffs' attorney's fees under the OPRA statute.

The FBI acted as the de facto custodian of the subject records by its conduct in taking control of the review, redaction, and exemption of the records and in view of the specific directives given to NJIT on how to proceed vis-à-vis plaintiffs' OPRA requests. See Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373 (App. Div. 2003)(finding the prosecutor's office liable for plaintiff's attorneys' fees under OPRA where prosecutor's office had assumed administrative responsibility to safeguard the 911 tape sought and ultimately ordered to be produced to plaintiff). By virtue of the FBI having been the entity that made all redactions to certain records, directed certain other records be entirely withheld from disclosure, and provided such direction in writing to NJIT, which NJIT in turn provided to plaintiffs, the FBI remains the real party in interest and, as such, an indispensable party to this action.

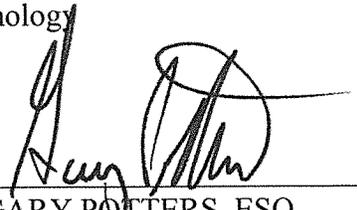
The legal principle of indemnification involves the assertion that another party is completely responsible for any damages a defendant is required to pay, Bree v. Jalbert, 87 N.J. Super. 452, 460 (Law Div. 1965), aff'd, 91 N.J. Super. 38 (App. Div. 1966), and can arise through common law or contract. See Public Service Elec. and Gas Co. v. Waldroup, 38 N.J. Super. 419, 432 (App. Div. 1955); Rosenberg v. Otis Elevator Co., 366 N.J. Super. 292 (App. Div. 2004). In accordance with the relief sought by defendants NJIT and Williams in the Third-Party action filed contemporaneously herewith, defendants must be indemnified and made whole by the FBI for (1) any adverse exposure defendants confront under the OPRA statute from and against any adverse judicial determination on the propriety of the redactions and exemptions, and (2) the attorneys' fees and costs incurred by NJIT in defending plaintiffs' claim.

Indemnification is most certainly warranted here by virtue of the fact it was solely the FBI's directive that caused defendants to be placed in the instant predicament. Put directly, had the FBI not intervened and prohibited defendants from disseminating the subject records to plaintiffs, NJIT would have released all of the records at issue thereby obviating the instant lawsuit. As such, to the extent this Court determines plaintiffs were unlawfully denied access, such denial was caused by the FBI and, consequently, the FBI must remain solely and exclusively liable for the attorneys' fees and costs incurred by plaintiffs in the first instance, as well as those incurred by defendants NJIT and Williams in having to defend this matter.

CONCLUSION

For the foregoing reasons, defendants respectfully request that plaintiffs' order to show cause be denied and that plaintiffs' verified complaint as against defendants NJIT and Williams be dismissed with prejudice.

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By: 

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